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U. S. Supr. Ct.

IN THE

Supreme Court of the United States

October Term, 1948.
No. 586

DANIEL G. MARSHALL,

Petitioner,

vs.

THE STATE BAR OF CALIFORNIA, a Public Corporation,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of California and Supporting Brief.

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DANIEL G. MARSHALL,

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THE STATE BAR OF CALIFORNIA, a Public Corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

To the Honorable, the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the order of the Supreme Court of the State of California, dated September 23, 1948, which denied [Carter, J., and Traynor, J., voting for issuance of a writ] [R. 28, fol. 53] the petition for writ of mandamus [R. 1-18] (filed in that court as an original proceeding), and the order of said Court, dated October 18, 1948, denying petition for rehearing [Carter, J., and Traynor, J., voting for a rehearing] [R. 31, fol. 61].

Statement of the Matter Involved.

The State Bar of California, a statutory public corporation regulating the practice of law in that state, has authorized participation in its operation as an agency of that state's government by an organization of lawyers which, as is known to said agency, excludes Negroes from membership in such organization. Said orders hold, in effect, that such participation is not violative of the United States Constitution.

Statement of Jurisdiction.

Jurisdiction to review said orders is invoked under the provisions of 28 United States Code, Section 1257(3); Act of June 25, 1948, Chap. 646, 62 Stat. 869, effective September 1, 1948.

Said orders are the final judgment of a final state court.

Argument in support of such jurisdiction appears in the annexed supporting brief.

Questions Presented.

Whether such participation violates the due process and equal protection clause of the Fourteenth Amendment of the United States Constitution as being:

(1) Prohibited governmental action discriminating against persons because of race or color;

(2) Operation of a governmental agency, in part, by means of an entity which discriminates against persons because of race or color.

Reasons Relied on for the Allowance of the Writ.

Such participation violates the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution, since it is prohibited governmental action discriminating against persons because of race or color and amounts to the operation of a governmental agency, in part, by means of an entity which discriminates against persons because of race or color.

Wherefore, petitioner prays that a writ of certiorari issue to bring said orders before this Honorable Court for review, that said orders be reversed, that such further proceedings be had as may be just under the circumstances, for such other relief as may be proper and for costs.

DANIEL G. MARSHALL,

Pro Se.

The undersigned hereby certifies that the foregoing petition is, in his opinion, well founded and that it is not interposed for delay.

DANIEL G. MARSHALL,

Pro Se.

IN THE

Supreme Court of the United States

October Term, 1948.

No. .....

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Petitioner,

vs.

THE STATE BAR OF CALIFORNIA, a Public Corporation,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

This Honorable Court Has Jurisdiction to Review the Orders in Question.

Jurisdiction to review the judgment in question is invoked under the provisions of 28 United States Code, Section 1257(3); Act of June 25, 1948, Chap. 646, 62 Stat. 869, effective September 1, 1948.

The petition for writ of mandate was filed in the Supreme Court of California as an original proceeding [R. 5, Petition, par. 18]. That court is the highest court of the state (California Constitution 1879, Art. VI, Sections 1-4) and has original, concurrent, coequal and coordinate constitutional jurisdiction with the District Courts of Appeal (another reviewing court), and the Su-

perior Court (the court of general jurisdiction) to issue prerogative writs, including mandamus (California Constitution 1879, Art. VI, Sections 4, 4(b) and 5; *In re Davidson,* 167 Cal. 727; *Goything v. McAleer,* 4 Cal. App. 655.)

A rule has been adopted under the authority of *Brougher v. Board of Public Works,* 107 Cal. App. 15, 20, requiring where it is sought to invoke the original jurisdiction of the Supreme Court or the District Court of Appeal that there be a showing in the petition for the prerogative writ of the circumstances which are asserted render it proper that the writ should issue originally from either of those courts and not from a lower court in the first instance. (Rules on Appeal, Rule 56(a); 22 Cal. 2d 35.) The petition contained allegations of the circumstances asserted to make it proper that the writ should issue originally from the Supreme Court and not from a lower court in the first instance [R. 5, 6, Petition, par. 18].

Without affording petitioner an opportunity to be heard, the petition for the writ was denied, without opinion, Mr. Justice Carter and Mr. Justice Traynor voting for the issuance of the writ [R. 28, fol. 53].

Again without affording petitioner an opportunity to be heard, his petition for rehearing was denied, without opinion, Mr. Justice Carter and Mr. Justice Traynor voting for a hearing [R. 31, fol. 61].

There is no appeal or other proceeding which can be had in California state courts to review said orders of the Supreme Court.

The respondent named in the petition did not file demurrer, answer or return. As allowed by rule (Rules

on Appeal, Rule 52(b), 22 Cal. 2d 35), it filed written opposition to the petition [R. 26, fol. 50, *et seq.*]. The Los Angeles Bar Association, as an interested party named in the petition, also filed a written opposition [R. 19, fol. 34]. These oppositions dealt exclusively with the merits of the constitutional issues. These constitutional issues were:

The Conference of State Bar Delegates is a body created by statute and by rules pursuant to statute. It is a part of the machinery of government in California dealing with the practice of law. Being such, each component element must conform to requirements of the United States Constitution, particularly the equal protection and due process clause of its Fourteenth Amendment. Participation in government by a body or entity which excludes persons because of race or color is a violation of that constitutional guaranty. (*Smith v. Allwright*, 321 U. S. 649; *Nixon v. Herndon*, 273 U. S. 536; *Nixon v. Condon*, 286 U. S. 273; *Norris v. Alabama*, 294 U. S. 587; *Pierre v. Louisiana*, 306 U. S. 354.) The Los Angeles Bar Association makes such exclusion. So far as such participation is concerned, it is unconstitutionally formed and cannot, by delegates selected by it from within or without its membership, be allowed such participation. Consequently, its delegates must be decertified.

If the Los Angeles Bar Association is a private organization, and hence may practice racial discrimination, it cannot by reason of this same private character exercise governmental functions. (*Washington ex rel. Seattle Title & Trust Company v. RoBerge*, 278 U. S. 116.)

That the Conference may only advise and recommend does not defeat the point since the principle of *Pierre v. Louisiana*, 306 U. S. 354, is to the contrary.

Had not the Supreme Court denied the petition, an alternative writ would have been issued and the case would have been channeled as provided in the Code of Civil Procedure, Sections 1084-1095.

The case at bar is not one in which it can be concluded that such denials amount only to a refusal by the Supreme Court of California to take original jurisdiction. In the first place, the Supreme Court did not say so as it did in *Brougher v. Board of Public Works,* 205 Cal. 426. In the second place, the statutory character of the State Bar and its relationship to the Supreme Court, under its decisions, are such that the Supreme Court is the only state court in which a claim of right under constitutional guaranties asserted against the State Bar, with respect to its internal operation, can be adjudicated. That court is, as noted, the highest state court.

That it is the only state court able to make such adjudication is shown when it is seen that approval of that court is necessary for the validity of the rules of the State Bar (Business and Professions Code, Section 6077); decisions of the State Bar adverse to attorneys must be filed in that court alone (Business and Professions Code, Section 6081); that court alone has the power to review such decisions. (Business and Professions Code, Section 6082.) Moreover, in proceedings original with it, and not taken to it on appeal, it has reviewed the methods of examination of candidates for admission to practice law. (*In re Admission to Practice Law,* 1 Cal. 2d 61; *Salot v. State Bar,* 3 Cal. 2d 615; *Spears v. State Bar,* 211 Cal. 183; *Staley v. State Bar,* 17 Cal. 2d 119; *In re Shattuck,* 208 Cal. 6.) It has reviewed, likewise in an original proceeding, the act of the State Bar in refusing admission to a candidate

without examination. (*Stillwell v. State Bar*, 29 Cal. 2d 119.)

There are two prerogative writ cases from California, filed as original proceedings in the Supreme Court of that state, which lend support to the petitioner here.

One of these, *Hamilton v. Regents of the University of California*, 293 U. S. 245, 55 S. Ct. 197, 79 L. Ed. 343, came here on a record like the one in the instant case, with one exception to be noted. In the cited case, as here, the petition for the writ was filed as an original proceeding in the Supreme Court of California, with no answer or other pleading being filed, and the writ being denied without opinion. (*Hamilton v. Regents, etc.*, 219 Cal. 663.) The exception mentioned is that an opinion was written in the cited case on the denial of the petition for rehearing (*Hamilton v. Regents, supra*) deciding a substantial federal question, while no opinion was written in the case at bar on the denial of the petition for rehearing. In the cited case, the petitioner was not obliged to petition for a rehearing. If he had not, the substantial federal question would nevertheless have been the basis of the denial of the writ in the first instances, as shown by the opinion which was later written. The order denying the writ, upon lapse of the time allowed to file a petition for rehearing, would have been the final judgment.

That the Supreme Court of California did not choose to follow in the case at bar the course it followed in the cited case by filing an opinion showing a substantial federal question on the petition for rehearing ought not to defeat resort to this Honorable Court. If that course had been followed, an opportunity would have been present for the Supreme Court of California to declare itself on

the serious federal question present here. Certainly a review of its orders will not be denied on the suspicion or speculation that they were based on a simple refusal to exercise the discretion so as to make the case a matter not reviewable here. If that court wanted to decide the federal question for the petitioner, it had the opportunity to do so. Not having taken the opportunity to do so, it must be regarded as having decided it against the petitioner which places the matter in a condition for review here.

The second of these cases is *In re Connor,* 16 Cal. 2d 701, 703, and the remand is reported in *Connor v. State of California,* 309 U. S. 631, 84 L. Ed. 989, 60 S. Ct. 708. Compare, also, *Gayes v. New York,* 332 U. S. 145.

The orders of the State Bar certificating the Los Angeles Bar Association as a recognized bar association, and certifying its delegates to the Conference of State Bar Delegates, are orders of the same kind and character as the order of the Regents of the University of California in *Hamilton v. Regents, etc., supra,* and reviewable here also since it was there held that such orders of a state agency are the equivalent of statutes, notwithstanding that the *Hamilton* case reached here as an appeal under Section 237(a) and the case here is certiorari. In either case, the power of review exists if a state statute is drawn in question.

Finally, this is a case like *Williams v. Kaiser,* 323 U. S. 471, 89 L. Ed. 398, and here, like there, the state ground of the decision, if there is one, is neither substantial nor sufficient and this Honorable Court must assume that the denial of the writ was based on the federal question which entitles the petitioner here to review.

Statement of Facts.

The facts shown by the transcript of record and applicable state statutes are as follows:

The State Bar of California is a public corporation.[1] The members of the State Bar are all persons admitted and licensed to practice law in California, except the justices and judges of courts of record, and membership in it is necessary to practice law.[2]

This public corporation is governed by a board known as the Board of Governors.[3] Subject to the laws of the State of California, the Board may formulate and declare necessary rules and regulations.[4] To be certified for admission and license to practice law, a person, must, among other requirements, pass a final bar examination by the Examining Committee of the State Bar.[5] Failure to pay dues fixed by statute[6] results in suspension from membership.[7] Fees become part of the funds of the State Bar,[8] which are used to pay the necessary expenses of the State Bar.[9]

With the approval of the Supreme Court of California, the Board of Governors may formulate and enforce rules

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[1]Business and Professions Code of the State of California, Chap. 4, Secs. 6000-6365; Stats. 1939, Chap. 34, paragraph 1, p. 347; Chap. 4 may be cited as the State Bar Act (Business and Professions Code, Sec. 6000).

[2]The State Bar Act, Secs. 6002, 6125.

[3]*Ibid.*, Sec. 6010.

[4]*Ibid.*, Sec. 6025.

[5]*Ibid.*, Secs. 6060, 6046.

[6]*Ibid.*, Sec. 6140.

[7]*Ibid.*, Sec. 6143.

[8]*Ibid.*, Sec. 6144.

[9]*Ibid.*, Sec. 6028.

of professional conduct for all members of the State Bar.[10] These rules are binding upon all members.[11] The Board has the power to recommend to the Supreme Court the disbarment or suspension of members from practice.[12]

Pursuant to Section 6025 of the Business and Professions Code, the Board has formulated and declared rules.[13] These rules establish a Conference of State Bar Delegates which acts upon all matters referred to it at the annual meeting by the Board of Governors, makes recommendations to it and to recognized bar associations, acts upon resolutions suggesting a change of law and makes an annual report in writing to the Board of Governors.[14] Delegates to the conference have the duty of attending meetings of the conference and the annual meeting of the State Bar and reporting to their respective bar associations.[15]

The Secretary of the State Bar, an employee of the Board,[16] is the secretary of the conference.[17]

Each "recognized bar association" is entitled to elect or appoint delegates, who need not be members of any recog-

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[10]*Ibid.*, Sec. 6076.

[11]*Ibid.*, Sec. 6077.

[12]*Ibid.*, Sec. 6078.

[13]R. 1, Petition for Writ of Mandamus, par. 5.

[14]R. 2, said petition, par. 5; R. 8, *et seq.*, Exhibit "A," Art. VI, Secs. 3-12.

[15]R. 13, 14, Exhibit "A," Art. VI, Sec. 13.

[16]State Bar Act, Sec. 6022.

[17]R. 12, Exhibit "A," Art. VI, Sec. 11(c).

nized bar association, to the conference in accordance with the size of its membership and members of the State Bar. who are not members of any recognized bar association, may also name delegates to the conference in the manner provided in the rules.[18]

The Board of Governors is required to recognize and certify bar associations which require, as a condition of membership, membership in the State Bar as "recognized bar associations," there being a limitation respecting the minimum number of members of such "recognized bar associations."[19]

The Los Angeles Bar Association is an unincorporated bar association which has been certified by the Board of Governors as a recognized bar association.[20]

The association has a written constitution which does not expressly prohibit the admission of Negroes, otherwise eligible thereunder, but as a matter of practice they have never been, at any time mentioned herein, and are not now, admitted to membership therein.[21]

The fact of this discrimination against Negroes has been known to the Board of Governors and the Secretary of the State Bar for several years past.[22]

Notwithstanding this knowledge, delegates from the Los Angeles Bar Association have been certified and accredited

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[18]R. 8, Exhibit "A," Art. VI, Secs. 4, 5.
[19]R. 7, Exhibit "A," Art. VI, Sec. 2.
[20]R. 2, said petition, par. 7.
[21]R. 2, said petition, par. 6.
[22]R. 2, said petition, par. 8.

to the Conference of State Bar Delegates at its 1946 and 1947 meetings, and they participated in the performance of the duties of the conference thereat.[23] Such was also the case at the 1948 convention.[24]

Demands that such certifications and accreditations upon the Board of Governors and the Credentials Committee of the conference be cancelled have been fruitless.[25]

Funds from the treasury of the State Bar have been used for the operation of the conference.[26] The treasury includes funds collected as dues from members of the State Bar, of whom petitioner is one, and which includes Negro members.[27]

There is no racial condition to membership in the State Bar.[28] Membership in the Los Angeles Bar Association is not necessary to practice law. Membership in a recognized bar association is not a condition to the status of delegate to the conference.[29] The State Bar Act of California created an integrated bar.[30]

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[23]R. 3, said petition, pars. 10, 11.

[24]Said petition does not allege this fact. It was filed before the 1948 Convention and acted on thereafter.

[25]R. 3, 4, said petition, pars. 13, 14, 15.

[26]R. 4, said petition, par. 16.

[27]R. 4, said petition, par. 16.

[28]State Bar Act, Sec. 6060.

[29]R. 9, said petition, Exhibit "A," Art. VI, Sec. 5.

[30]151 A. L. R. 617.

Specification of Errors and Argument.

The Supreme Court of California erred in making said orders and judgment for the reason that bestowal of the status of a recognized bar association by the State Bar of California, an agency of the government, on the Los Angeles Bar Association, a private association, which, known to that state agency, discriminates against Negroes in its membership policy, certification and accreditation of delegates from that Association by the State Bar to the Conference of State Bar Delegates, an integral phase in the operation of such agency established by the State Bar, and participation in the functioning of said Conference by said delegates violates the due process and equal protection clauses of the United States Constitution.

This substantial federal question was presented to the Supreme Court of the State of California by the petition for writ of mandamus [R. 4, Petition, par 17].

Certification of the Los Angeles Bar Association as a recognized bar association, and accreditation of its delegates by the State Bar of California, knowing of the racial exclusion policy of the Association, and participation of the delegates in the functioning of the Conference of State Bar Delegates, created by the State Bar as an integral part of its operation as an agency of the government, falls within the interdiction of *Smith v. Allwright, supra; Nixon v. Herndon; Norris v. Alabama, supra,* and *Nixon v. Condon, supra.*

It is, moreover, within the realm of unconstitutionality spoken directly of by the Supreme Court of California

itself in *James v. Marinship Corp.*, 25 Cal. 2d 721, since it is a discriminatory practice contrary to the public policy of that state and the United States.

The Fourteenth Amendment protects the citizen against the state and all its creatures (*West Virginia State Board v. Barnette,* 319 U. S. 624) and this protection is needed here.

Justification of the racial exclusion policy of the Los Angeles Bar Association on the ground that it is a private organization, constitutionally entitled to discriminate, leads inevitably to the conclusion that it cannot, by reason of this same private character, exercise governmental functions, on the authority of *Washington ex rel. Seattle Title & Trust Company v. RoBerge,* 278 U. S. 116.

Nor is the fact that the Conference of State Bar Delegates is an advisory body only sufficient to excuse the situation of which complaint is here made, according to *Pierre v. Louisiana,* 306 U. S. 354.

Respectfully submitted,

DANIEL G. MARSHALL,

Pro Se.